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SUPREME COURT U.S.

IN THE SUPREME COURT
OF THE UNITED STATES

PAUL AUCLAIR,
Appellant,

vs

No. 82 6798

THE STATE OF WYOMING,
Appellee,

JURISDICTIONAL STATEMENT

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STATEMENT OF THE ISSUE

1. Was the Appellant's sixth Amendment right to Counsel denied by the use of an introduction into evidence at trial, of the transcript of a telephone conversation between Appellant and his daughter, when that phone call was recorded after the initiation of formal Judicial proceedings and without Appellant's Knowledge?

2. The decision of the Wyoming Supreme Court is probably not in accordance with decisions made in this court, as the decisions of the Wtoming Supreme court not only allows the Police to make a criminal complaint and acquire an arrest warrant but encourages the police to do so without arresting the accused and continue to investigate after they have the criminal complaint and arrest warrant, thereby denying the accused the rights guaranteed by the constitution of the United States. This decision gives all power to the police and denies all rights and freedoms of the accused, in violation of the Constitution of the United States, therefore this issue deserves consideration by the Supreme Court of the United States.

3. This issue has not been decided in this Court.

STATEMENT OF THE CASE

This is an appeal from a proceeding in the Park County District Court of the Fifth Judicial District, the Honorable Judge John T. Dixon presiding. Appellant was convicted by jury trial on May 6th, 1982 on three charges. 1) Taking indecent and immoral liberties with a child, in violation of Wyoming Statutes § 14-3-105 (1977). 2) Unlawfully soliciting, procuring, or knowingly encouraging a child under the age of sixteen years to engage in illicit sexual penetration or sexual intrusion, in violation of Wyoming Statutes § 14-3-104 (1977). 3) Being a parent who unlawfully had sexual intercourse with his child knowing her to be such, in violation of Wyoming Statutes § 6-5-102 (1977). Record Vol. I at 79-80. On July 27, 1982 Appellant was sentenced by the Honorable Judge John T. Dixon to not less than six years nor more than eight years for taking indecent and immoral liberties with a child; to not less than four years nor more than five years for soliciting, procuring or knowingly encouraging a child under the age of sixteen years to engage in illicit sexual penetration or sexual intrusion; and to not less than four years nor more than five years for the commission of incest. These sentences were to be served concurrently in the Wyoming State Penitentiary. Record Vol. I at 97-98.

STATEMENT OF THE FACTS

On approximately October 23, 1981, Appellant's 13 year old daughter, Robin Auclair, reported to Bob Coorough, Powell Chief of Police, that Appellant had had an incestuous relationship with her. Record Vol. IV at 26. Based upon his interview with Ms. Auclair, Police Chief Corrough, on the 24th of October, 1981, signed a criminal complaint against Appellant and an arrest warrant was issued by Justice of the Peace Hunter Patrick. Record Vol. I at 2-3. On the 25th of October, 1981, Appellant voluntarily went to the Powell Police Station, where he was informed by Police Chief Corrough of the allegations made against him by his daughter. Defendants Exhibit O at 1. Police Chief Corrough then informed Appellant of his rights and asked Appellant if he understood his rights. Appellant answered in the affirmative and Police Chief Coorough proceeded to interrogate him. Record Vol. V at 199. During the interrogation Appellant, on several occasions, requested an opportunity to speak with his daughter. Defendants Exhibit O at 9, 22, 24, 29. At the conclusion of the interrogation, Appellant was permitted to leave despite the fact that Police Chief Coorough knew a warrant was outstanding for his arrest. On October 26, 1981 Police Chief Coorough arranged for Ms. Auclair to talk to the Appellant by phone. Ms. Auclair placed the call to her father and tape recorded the conversation according to instructions given her by the police. She was given specific instructions to deny, to the Appellant, that the call

was being taped, which she did. Record Vol. V at 194. Following the recording of the phone conversation, at approximately 9:30 P.M. on October 26th, 1981, Appellant was arrested pursuant to the arrest warrant which had been outstanding for two days. Record Vol. V at 197. At trial, defense counsel objected to the introduction into evidence of the telephone conversation transcript, Record Vol. V at 196, but it was admitted. Record Vol. V at 218.

ARGUMENT

I. WAS THE APPELLANTS SIXTH AMENDMENT RIGHT TO COUNSEL DENIED BY THE USE AND INTRODUCTION INTO EVIDENCE AT TRIAL, OF THE TRANSCRIPT OF A TELEPHONE CONVERSATION BETWEEN APPELLANT AND HIS DAUGHTER, WHEN THAT PHONE CALL WAS RECORDED AFTER THE INITIATION OF FORMAL JUDICIAL PROCEEDINGS AND WITHOUT APPELLANTS KNOWLEDGE?

The Sixth Amendment right to counsel has unequivocally been recognized by the United States Supreme Court as a fundamental right, essential to a fair trial, and therefore applicable to the states through the Fourteenth Amendment. Gideon v. Wainwright, 372 U.S. 335 (1963). In applying this fundamental right the same constitutional standards bind both the Federal and State Governments. Benton v. Maryland, 395 U.S. 784 (1969).

The right to assistance of counsel arises in basically two distinct factual situations. One is during proceedings conducted while under judicial surveillance. In a courtroom the defendants right to counsel grants him the assistance of an attorney to aid him in understanding the technical intricacy of the trial process, and to ensure the accused that his myriad of rights will be fully exercised. Powell v. Alabama, 287 U.S. 45 (1932).

The second situation in which the right to counsel arises is during out-of-court proceedings conducted by law enforcement

personnel. Under such circumstances an attorney acts, not only to safeguard his clients rights and to insure that they are not unintentionally waived, but also as a counterbalance against potential overreaching or other unfair tactics on the part of the law enforcement personnel. Miranda v. Arizona, 384 U.S. 436 (1966).

> "Counsel, then has been more than a technical aid; he has served to overcome the original unfairness of the balance of state against individual. Historically, this role has been played mainly at trial - the focus of confrontation. If, however, a critical confrontation occurs at the earlier investigative stage of the process, we might have to alter our conception of the role counsel must play to readjust the balance".

Comment, 73 Yale L.J. 1000, 1034 (1964).

Appellant firmly believes that the tapping and recording of his telephone conversation with his daughter, and the use at trial of the transcript of that conversation, constituted a violation of his right to counsel. The wrongful admission into evidence of that transcript mandates a reversal of Appellants conviction. The conversation was a surreptitious interrogation of Appellant, through his daughter Robin, designed to deliberately elicit incriminating statements in the absence of counsel.

The initial inquiry, in a case such as this, is at what point does the right to have the assistance of an attorney attach? A brief review of the relevant facts is appropriate at this time.

On October 24th, 1981, Powell Police Chief Bob Coorough, based on an interview conducted with the complaining witness

Robin Auclair, signed a criminal complaint against the Appellant. At that same time Justice of the Peace Hunter Patrick issued a criminal warrant for the arrest of Appellant. Record Vol. 1 at 3. On the following day, October 25th, 1981 Appellant voluntarily went to the Powell Police Station. Police Chief Coorough advised him of his rights and the Appellant stated he understood his rights, but wished to talk anyway. Record Vol. V at 199. Police Chief Coorough interrogated Mr. Auclair about the alleged incidents but did not arrest him. On October 26, 1981, while the arrest warrant was still outstanding, Robin Auclair phoned her father and tape recorded the conversation pursuant to instructions given her by the police. Record Vol. V at 194. She was instructed not to allow the Appellant to know that the conversation was being recorded and to deny it if he asked. Record Vol. V at 194. Appellant did inquire if the police were listening and Ms. Auclair denied that the police were taping the call. States Exhibit #23 at 9. Later on the same day, October 26th, 1981, the Appellant was arrested. Record Vol. V at 197.

In the case of Massiah v. United States, 377 U.S. 201 (1964), the United States Supreme Court strongly affirmed the right of a criminal defendant to have assistance of counsel during pre-trial extrajudicial proceedings. Massiah was arrested, arraigned and later indicted for possession of narcotics. After his release on bail, Massiah had a conversation with a co-defendant in a car, in which he made several incriminating statements. Unknown to Massiah, his co-defendant had struck a deal to cooperate with the prosection and had allowed

them to electronically bug the automobile. A federal agent overheard Massiah's incriminating statements and testified at trial as to their content. Massiah was convicted. Massiah at 203. The Supreme Court reversed that conviction holding that the use of his own incriminating statements against him at trial was a violation of Massiah's Sixth Amendment right to counsel, when the statements were deliberately elicited by federal agents without his knowledge, after indictment and in the absence of counsel. Massiah at 206. The Supreme Court said the right to counsel "must apply to indirect and surreptitious interrogations as well as those conducted in the jailhouse." Massiah at 206.

Appellant argues that the facts in the Massiah case closely parallel those in the case on appeal. The requirements of the Massiah holding will be shown to be present, with the exception of the indictment. Under judicial reasoning which has occurred subsequent to the 1964 Massiah decision, an indictment is no longer necessary for the attachment of the right to counsel. Instead, the United States Supreme Court and the Wyoming Supreme Court have analyzed these cases based upon whether or not a "critical stage" of the proceedings had been reached, therefore giving rise to a need for the assistance of an attorney.

Many events prior to the actual trial have been recognized as being "critical stages." Among these are: the arraignment, Powell v. Alabama, supra,; post-indictment lineups, United States v. Wade, 388 U.S. 218 (1967); custodial interrogations, Miranda

v. Arizona, supra; and preliminary hearings, Coleman v. Alabama, 399 U.S. 1 (1979). The initiation of adversary judicial proceedings has also been viewed as the point in time at which the right to counsel attaches. In Kirby v. Illinois, 406 U.S. 682 (1972), a plurality of the United States Supreme Court stated:

> "The initiation of judicial criminal proceedings is far from a mere formalism. It is the starting point of our whole system of adversary criminal justice. For it is only then that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law. It is this point, therefore, that marks the commencement of the 'criminal prosecutions' to which alone the explicit guarantees of the Sixth Amendment are applicable."

Kirby at 689-690.

This plurality analysis of the court was later endorsed by a majority of the members in Brewer v. Williams, 430 U.S. 387 (1977), when the Supreme Court said,

> "Whatever else it may mean, the right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him - whether by way of formal charge, preliminary hearing, indictment, information, or arraignment."

Brewer at 398.

The Wyoming Supreme Court has also addressed the issue of what constitutes a critical stage of the proceedings. In Thomas v. Justice Court of Washakie County, 538 P.2d 42 (Wyo. 1975), the court stated, an accused "...need not stand alone

against the state at any stage of the prosecution, formal or informal, where counsel's absence might derogate from the accused's right to a fair trial." Thomas at 47. Chavez v. State of Wyoming 604 P.2d 1341 (Wyo. 1979), provides more support for the assertion that a surreptitious interrogation is a critical stage. Chavez had been charged with two counts of forgery. For reasons not relevant to present discussion, he was then left for two weeks without assigned representation. The Wyoming Supreme Court held Chavez had been denied his Constitutional right to assistance of counsel. The rationale relied on was that nothing occurred, either critical or non-critical, relating to the defendant, during the two weeks he had been without counsel. The Court listed several events which, had they occurred, would have triggered Chavez's right to counsel. Among these was the subjecting of the defendant to "investigative stratagies". Chavez at 1347.

Several other states have held that the initiation of formal judicial proceedings occurs at the time that a criminal complaint and/or an arrest warrant are issued. Among these states are Missouri, Arnold v. State, 484 S.W.2d 248 (Mo. Sup. Ct. 1972); California, People v. McGowan, 105 Cal. App.3d 997, 166 Cal. Rptr. 725 (1980); Illinois, People v. Faulkner, 80 Ill. App.3d 136, 407 N.E.2d 126 (1980); New York, People v. Samuels, 49 N.Y.2d 218, 400 N.E.2d 1344 (1980); People v. Pawlyshyn, 79 A.D.2d 771, 435 N.Y.S.2d 59 (1980), People v. Kazmarick, 52 N.Y.2d 322, 438 N.Y.S.2d 247 (1981); and Tennessee, State v. Mitchell, 593 S.W.2d 280 (Tenn. Sup.Ct. 1980). It should be noted

that New York Statutes expressly provide that the filing of a felony complaint commences a criminal action. N.Y. Criminal Procedure Law § 1.20 (1,8,17) (McKinney 1981). However, the New York court's analysis is still relevant for our consideration.

> "The sole function of a warrant of arrest is to achieve a defendants appearance in a criminal action for the purpose of arraignment upon the accusatory instrument by which such action was commenced. ...The police of course may continue to investigate after the filing of the felony complaint, as they may after an indictment has been returned. But once the accusation has been made in a court the case is no longer merely a subject of investigation."

People v. Samuels, 49 N.Y.2d 218, 400 N.E.2d 1344 at 1346.

The Tennessee Supreme Court has said, "We hold the right to counsel attaches when adversary judicial proceedings are initiated. Initiation is marked by formal charge, which we construe to be an arrest warrant." State v. Mitchell, 593 S.W.2d 280 at 286. This holding was based upon the idea that the issuance of an arrest warrant marks the end of the investigatory stage and the beginning of the accusatory stage. The court cited the Tennessee Code Annotated § 40-701 to § 40-704 which contains language similar to that found in the Wyoming Rules of Criminal Procedure, Rule 3 and 4.

Applying these principles to the case at hand we see that judicial proceedings had been initiated by the signing of the complaint and the swearing out of an arrest warrant against Mr. Auclair. In addition, the accused was subjected to investigative

strategies consisting of a surreptitious interrogation by the police, through his daughter, Robin. These two events, when considered together, most assuredly triggered the Appellants constitutional right to the assistance of counsel.

Having established the Appellants right to counsel, it remains to be shown under the Massiah holding that incriminating statements were deliberately elicited from the accused.

Two excerpts of the phone conversation were particularly incriminating. The first is as follows:

Paul Auclair: "There's only one way out of this and that's for you to just get up and tell them you're lying."

Robin Auclair: "That'd be lying though."

Paul Auclair: "But it's the only way out of this."

States Exhibit #23 at 2.

This portion of the conversation was not only included in the typed transcript which was admitted into evidence, but was discussed before the jury during the cross-examination of the Defendant. Record Vol. VI at 440.

The second incriminating portion of the conversation were the repeated apologies made by the Defendant to his duaghter. States Exhibit #23 at 6-7. These were also brought to the attention of the jury on the cross-examination of Mr. Auclair. Record VI at 443.

Were the incriminating statements deliberately elicited? In a post Massiah decision the United States Supreme Court had occasion to consider this requirement. United States v. Henry,

447 U.S. 264 (1980). Henry was indicted for bank robbery and held in a city jail pending trial. Federal agents approached a known informant, who was being held in the same cellblock with Henry, and told the informant to be alert to any statements made by his fellow inmates. The agents specifically instructed the informant not to question Henry about the alleged bank robbery or initiate any conversations. Henry at 266. Henry made incriminating statements to the informant, who testified as to their content at trial. The Court held that the deliberately elicited test of Massiah had been met, and they affirmed the lower courts reversal of Henry's conviction saying, "By intentionally creating a situation likely to induce Henry to make incriminating statements without the assistance of counsel, the government violated Henry's right to counsel."

Henry at 274.

Appellant argues that the government, in the case at bar, also intentionally created a situation likely to induce him into making incriminating statements. The police arranged the phone call and instructed Robin on how to record the conversation. Robin was specifically told to deny to her father that their conversation was being taped. It is clear that the police intended that the verbal reunion between father and daughter would result in an incriminating statement.

One other fact helps to support a finding of deliberate elicitation. Why, when the complaint was signed and the arrest warrant was issued on the 24th of October, did the police wait until after the phone call was completed on October 26th

to arrest the Appellant? Powell Police Chief Bob Coorough testified that the arrest was delayed until the 26th in order to obtain the results of a doctor's examination conducted on Robin Auclair. Record Vol. V at 198. However, the criminal complaint prepared by Chief Coorough and signed by the Justice of the Peace on the 24th of October makes specific mention of the results of the doctors examination. Record Vol I, at 2.

There can be no doubt that the Appellant did not waive his right to assistance of counsel under current constitutional standards. For a finding of waiver the burden is imposed upon the state to show "an intentional relinqiushment or abandonment of a known right or privilege." Brewer v. Williams, 430 U.S. 387 at 404. "Presuming waiver from a silent record is impermissible." Carnley v. Cochran, 369 U.S. 506 at 516 (1962). The record in the present case is silent as to an affirmative waiver of the right to counsel pertaining to the telephone conversation.

Appellant has established, under the facts of the case, a right to assistance of counsel, and a denial of that right through the use at trial and introduction into evidence, of the transcript of a telephone conversation between himself and his daughter. The United States Supreme Court has stated, "that the assistance of counsel is among those constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." Holloway v. Arkansas, 435 U.S. 475 at 489 (1978). The Wyoming Supreme Court, in the case

of Chavez v. State of Wyoming, supra, cited Holloway with approval and added a quotation from Glasser v. United States, 315 U.S. 60 (1942)

> "the right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."

Chavez v. State of Wyoming, 604 P.2d 1341 at 1345 (Wyo. 1979).

The denial of Appellant's Sixth and Fourteenth Amendment right to assistance of counsel mandates reversal of his conviction.

Respectfully submitted,

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MAR 23 1983

IN THE SUPREME COURT, STATE OF WYOMING

OCTOBER TERM, A.D. 1982

March 21, 1983

PAUL AUCLAIR, Appellant (Defendant), v. STATE OF WYOMING, Appellee (Plaintiff).	)	No. 5775

Appeal from the District Court of Park County, the Honorable John T. Dixon, Judge.

Sylvia Lee Hackl, State Public Defender; Gerald M. Gallivan, Director, Wyoming Defender Aid Program; and Kurt C. Weiss, Intern, signed the brief on behalf of appellant. Mr. Weiss appeared in oral argument.

A. G. McClintock, Attorney General; Gerald A. Stack, Deputy Attorney General; Allen C. Johnson, Senior Assistant Attorney General; and Thomas T. C. Campbell, Intern, signed the brief on behalf of appellee. Mr. Campbell appeared in oral argument.

Before ROONEY, C.J., and RAPER, THOMAS, ROSE, and BROWN, JJ.

RAPER, J., delivered the opinion of the court. THOMAS, J., filed a specially concurring opinion.

NOTICE: This opinion is subject to formal revision before publication in Pacific Reporter Second. Readers are requested to notify the Clerk of the Supreme Court, Supreme Court Building, Cheyenne, Wyoming 82002, of any typographical or other formal errors, in order that corrections may be made before final publication in the permanent volume.

RAPER, Justice.

Paul Auclair (appellant) was found guilty by a jury and sentenced on three criminal counts 1/ arising from an incestuous relationship he engaged in with his thirteen year-old daughter. During the trial the transcript of a recorded telephone conversation between appellant and his daughter, held before appellant was arrested, was introduced and received into evidence by the trial judge over his objection. Appellant raises on appeal the following issue:

> "Was the appellant[']s Sixth Amendment right to counsel denied by the use and introduction into evidence at trial, of the transcript of a telephone conversation between appellant and his daughter, when that phone call was recorded after the initiation of formal judicial proceedings and without appellant[']s knowledge?"

We will affirm.

On October 23, 1981, appellant's daughter contacted a social worker from the Wyoming Department of Public Assistance and Social Services (DPASS) and revealed to him that her father (appellant) had, for the past several months, engaged in an incestuous relationship with her. She, later that day, told the same story to Powell Chief of Police, Bob Coorough. After the initial interview, DPASS placed appellant's daughter in a foster home. On October 24, 1982, a criminal complaint alleging appellant had violated § 6-5-102, W.S.1977--Wyoming's incest statute--was made and filed by Chief Coorough pursuant to Rule 3, W.R.Cr.P. On the same date, an arrest warrant was issued by the justice of the peace pursuant to Rule 4, W.R.Cr.P. for the arrest of appellant.

On October 25, 1981, appellant, by his own account, voluntarily went to the Powell police station where Chief Coorough informed him of the allegations made by his daughter. Chief Coorough, prior to any conversation with appellant at the police station, insured that appellant was aware of his constitutional rights--per Miranda. He then proceeded to interview appellant about his daughter's allegations. During the interview, appellant complained that, since DPASS had taken his daughter, he had been unable to talk to her and would like to do so to clear up the mat-

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1/ Appellant was convicted and sentenced to: six to eight years in the penitentiary for taking indecent liberties with a child in violation of § 14-3-105, W.S.1977; four to five years in the penitentiary for committing incest in violation of § 6-5-102, W.S.1977; and four to five years in the penitentiary for engaging in illicit sexual relations with a child in violation of § 14-3-104, W.S.1977; all sentences to be served concurrently.

ter. At the conclusion of the interview, despite the fact that a warrant had issued against him, appellant was allowed to go home.2/ The interview was not objectionable to appellant who, at trial, offered a transcript of that interview, which was received in evidence.

On October 26, 1981, at the request of Chief Coorough, appellant's daughter was examined by a physician to determine if there was evidence that would corroborate her allegations. The examination revealed, in the opinion of the physician, that appellant's thirteen year-old daughter had previously, and on more than one occasion, had sexual intercourse with an adult male. There was medical evidence that prior to returning to live with her father she had not yet engaged in sexual intercourse. Chief Coorough later testified that, in his mind, the physical examination further substantiated the allegations made by the little girl against appellant.

Also on the 26th, Chief Coorough arranged for appellant's requested conversation with his daughter. Appellant was not allowed to speak with her in person but was allowed to talk to her by telephone. She spoke from a social services office in Powell. The conversation was tape recorded at the request of the police. There is nothing in the record to indicate that the police instructed appellant's daughter what to say to her father other than it was requested that she not let her father know that the conversation was being taped. She was instructed to deny that the call was being taped if her father questioned that fact. During the conversation, in the face of denials by his daughter, appellant indicated his awareness that the conversation was being taped and indicated that he really did not care whether it was taped or not. The transcript reveals no instance where appellant ever admitted any criminal wrongdoing, although the State, in its zeal, apparently believed selected passages were incriminating.3/

2/ Chief Coorough explained that he wanted to wait until the little girl was examined by a physician and her story could be somewhat substantiated before acting on the arrest warrant.

3/ Appellant complains of the State's use of the following exchange:

> "[Appellant] There's only one way out of this and that's for you to just get up and tell them you're lying.
>
> "[Daughter] That'd be lying though.
>
> "[Appellant] But it's the only way out of this.
>
> "[Daughter] That'd be lying."

After all of the foregoing took place, appellant was finally arrested during the evening of October 26th. He appeared initially before a justice of the peace October 27, 1981. From that time on he has been represented by a public defender.

A transcript of the recorded telephone conversation between appellant and his daughter was introduced by the State at trial as State's Exhibit 23, and was objected to on the grounds that it was unfair and obtained as the result of an illegal wiretap. The objection was ultimately overruled and the transcript of the telephone conversation was received into evidence. During the State's cross-examination of appellant, certain allegedly incriminating passages in portions of the transcript were alluded to.

Appellant now on appeal raises a Sixth Amendment objection to the evidence in question when no objection on that ground was raised at trial. At trial, the transcript of the telephone conversation was objected to on the ground that it was the product of an illegal wiretap--a Fourth Amendment issue. That, of course, was not on valid ground and the objection was properly overruled. See, Hoffa v. United States, 385 U.S. 293, 87 S.Ct. 408, 17 L.Ed.2d 374 (1966), reh. denied 386 U.S. 951, 87 S.Ct. 971, 17 L.Ed.2d 880 (1967).4/ Rule 103, W.R.E. 5/ requires us, where new

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4/ In Hoffa the Court said:

> "Neither this Court nor any member of it has ever expressed the view that the Fourth Amendment protects a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it. Indeed, the Court unanimously rejected that very contention less than four years ago in Lopez v. United States, 373 U.S. 427, 83 S.Ct. 1381, 10 L.Ed.2d 462. In that case the petitioner had been convicted of attempted bribery of an internal revenue agent named Davis. The Court was divided with regard to the admissibility in evidence of a surreptitious electronic recording of an incriminating conversation Lopez had had in his private office with Davis. But there was no dissent from the view that testimony about the conversation by Davis himself was clearly admissible." 385 U.S. at 302-303, 87 S.Ct. at 413-414.

See also, United States v. White, 401 U.S. 745, 91 S.Ct. 1122, 28 L.Ed.2d 453, reh. denied 402 U.S. 990, 91 S.Ct. 1643, 29 L.Ed.2d 156 (1971).

5/ Rule 103, W.R.E., provides, in pertinent part:

> "(a) Effect of erroneous ruling.--Error may not be predicated upon a ruling which admits or excludes

grounds for objecting to the admission of evidence are raised on appeal, to consider whether plain error nullified the conviction. 1 Louisell and Mueller, Federal Practice §§ 8 and 21 (1977). We, therefore, take up the Sixth Amendment issue to determine if plain error occurred.

We have recently set out the three-part test to determine if plain error exists:

> "* * * First, the record must be clear as to the incident which is alleged as error. Second, the party claiming that the error amounted to plain error must demonstrate that a clear and unequivocal rule of law was violated. Finally, that party must prove that a substantial right has been denied him and as a result he has been materially prejudiced. * * *" Bradley v. State, Wyo., 635 P.2d 1161, 1164 (1981).

In this case we turn our attention only to the second requirement and look to see if appellant's right to counsel was violated since the record is clear as to the incident alleged as error. We do not dispute that the right involved is substantial. If a violation of appellant's right to counsel is found, we have indicated that it is such a basic right that its violation can never be treated as harmless error. Chavez v. State, Wyo., 604 P.2d 1341, cert. denied 446 U.S. 984 (1979) (following Holloway v. Arkansas, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978)). We note, however, the following language from Holloway:

> "Moreover, this Court has concluded that the assistance of counsel is among those 'constitutional rights so basic to a fair trial that their infraction can never be treated as harm-

---

evidence unless a substantial right of the party is affected, and

> "(1) Objection.--In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; * * *
>
> * * * * * *
>
> "(d) Plain error.--Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court."

> less error.' Chapman v. California, supra [386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)], at 23. Accordingly, when a defendant is deprived of the presence and assistance of his attorney, either throughout the prosecution or during a critical stage in, at least, the prosecution of a capital offense, reversal is automatic. Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); Hamilton v. Alabama, 368 U.S. 52, 82 S.Ct. 157, 7 L.Ed.2d 114 (1961); White v. Maryland, 373 U.S. 59, 83 S.Ct. 1050, 10 L.Ed.2d 193 (1963)." 435 U.S. at 489, 98 S.Ct. at 1181.

In the instant case we are not confronted with the prosecution of a capital offense nor does the claimed deprivation of the right to counsel here arise out of any conflict of interest among several defendants who have been required to be jointly represented by one attorney. We turn our attention then to determine if the trial court violated appellant's Sixth Amendment right to counsel by its ruling to receive the transcript of the telephone conversation into evidence.

The Sixth Amendment to the United States Constitution guarantees that: "In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence."6/ Appellant argues here that this right to counsel accrued after an arrest warrant issued but before his arrest occurred. We disagree.

Rule 6, W.R.Cr.P. sets out when an indigent's right to assignment of counsel accrues under our rules:

> "Every defendant who is unable to obtain counsel shall be entitled to have counsel assigned to represent him at every stage of the proceedings from his initial appearance before the commissioner or the court through appeal, unless he waives such appointment."

That rule, as we shall show, though relating only to assignments of counsel, states the general view as regards the Sixth Amendment right to counsel of all criminal defendants. In Chavez v. State, supra, this court summarized the then-existing state of Sixth Amendment jurisprudence. Little has changed to expand that right since then.

6/ Section 10, Art. 1 of the Wyoming Constitution likewise provides for the right to counsel in criminal prosecutions and tracks the federal provision.

The Sixth Amendment has been made applicable to the states through the Fourteenth Amendment. Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799, 93 A.L.R.2d 733 (1963). The basic contours of the right are identical in both state and federal contexts. Brewer v. Williams, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424, reh. denied 431 U.S. 925, 97 S.Ct. 2200, 53 L.Ed.2d 240 (1977), and Benton v. Maryland, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969). It is without question that a criminal defendant is entitled to be represented at all stages of the proceeding against him. Chavez v. State, supra, and Hoskins v. State, Wyo., 552 P.2d 342, cert. denied 430 U.S. 956 (1976). In a long line of constitutional cases reaching back to Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158, 84 A.L.R. 527 (1932), the United States Supreme Court has firmly established that an individual's Sixth and Fourteenth Amendment right to counsel only accrued at or after the time adversary judicial proceedings have been initiated against him. Kirby v. Illinois, 406 U.S. 682, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972). In Powell v. Alabama the Court spoke in terms of critical periods or critical stages in the proceeding, other than trial itself, when the right to counsel attaches. A critical stage of the proceedings has been held to include:

> "* * * arraignment, Powell v. State of Alabama, supra; preliminary hearing, Coleman v. Alabama, 399 U.S. 1, 90 S.Ct. 1999, 26 L.Ed.2d 387 (1970); after the initiation of adversary judicial criminal proceedings, Kirby v. Illinois, 406 U.S. 682, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972); at custodial interrogation, Miranda v. State of Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966); and Escobedo v. State of Illinois, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964); at post-indictment lineup, United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967); at corporeal identification after initiation of adversary judicial criminal proceedings, Moore v. Illinois, 434 U.S. 220, 98 S.Ct. 458, 54 L.Ed.2d 424 (1977)." Chavez v. State, 604 P.2d at 1347.

We note here, before proceeding further, that appellant's Fifth Amendment privilege against compulsory self-incrimination is not involved. Although the Supreme Court's decision in Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, 10 A.L.R.3d 974 (1966), required an accused's right to counsel be included in its now classical warning, that case dealt with the Fifth Amendment and custodial interrogations.7/ To come within the

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7/ We note that although Miranda was briefed and argued as a Sixth Amend-

requirements of Miranda, custodial interrogation must still be present. Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378, reh. denied 452 U.S. 973, 101 S.Ct. 3128, 69 L.Ed.2d 984 (1981). We are not confronted with a custodial interrogation here under any construction of that term. See Rhode Island v. Innis, 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980) (discussing meaning of "custodial interrogation").

With the foregoing in mind, we turn to appellant's specific argument here. He urges us to adopt the position that the Sixth Amendment right to counsel attaches at the time an arrest warrant issues, regardless of whether an individual has been arrested or placed in custody. If we were to adopt such a position, he then argues that under Massiah v. United States, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964), the contents of his October 26th conversation with his daughter were inadmissible at trial as being obtained without a waiver of his right to counsel. Of course, ultimately appellant would then have us say that by allowing the contents of his telephone conversation to be admitted at trial, the trial court committed plain error for which he contends we must reverse. In that we will hold there was no error in admitting the transcript, we need not reach plain error as a ground to reverse.

In Massiah v. United States, supra, and for that matter in the more recent and factually similar cases of Brewer v. Williams, supra, and United States v. Henry, 447 U.S. 264, 100 S.Ct. 2183, 65 L.Ed.2d 115 (1980), the Supreme Court held that post-indictment or post-arraignment statements from defendants surreptitiously obtained without waiver of their right to counsel were inadmissible at trial in violation of the defendant's Sixth Amendment right to counsel. Those cases dealt particularly with post-indictment or post-arraignment statements and not with pre-arrest statements.

In the case before us the statements complained of were made not only before a district court information was filed or an arraignment proceeding held, but also before appellant was arrested. After a careful review of the United States Supreme Court's Sixth Amendment decisions, we have yet to find a case in which the Sixth Amendment right to counsel was held to accrue prior to arrest, whether a warrant was outstanding or otherwise. The Court, in Kirby v. Illinois, supra, discussing when the right to counsel attaches, said:

"* * * [T]he point is that, while members of

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ment right-to-counsel case, to the surprise of Miranda's ACLU attorneys it was decided as a landmark Fifth Amendment case in which the right to counsel was addressed only in the context of custodial interrogations and then only to secure the Fifth Amendment privilege against self-incrimination. 61 F.R.D. 259, 278 (1972) (remarks of John J. Flynn); Miranda v. Arizona, supra.

> the Court have differed as to existence of the right to counsel in the contexts of some of the above cases, all of those cases have involved points of time at or after the initiation of adversary judicial criminal proceedings--whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." (Emphasis in original.) 406 U.S. at 689, 92 S.Ct. at 1882.

That statement does not declare at which elaborated event adversary judicial proceedings begin, it states that the right attaches at whichever of those events adversary judicial proceedings have begun. Of particular note is the Court's language, "adversary judicial criminal proceedings," to set the point at which the right attaches rather than simply setting it when judicial proceedings have begun. In United States v. Ash, 413 U.S. 300, 93 S.Ct. 2568, 37 L.Ed.2d 619 (1973), after setting out the historical development and expansion of the Sixth Amendment's right to counsel, the Court said that it looks, when setting the point at which the right attaches, to determine whether the accused required legal aid in coping with legal problems or meeting his adversary.

The Court, in holding that an identification of an accused at a post-arrest preliminary hearing without the assistance of counsel was a violation of the accused's right to counsel said: at that point the accused found himself confronted with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law. Moore v. Illinois, 434 U.S. 220, 98 S.Ct. 458, 54 L.Ed.2d 424 (1977) (quoting from Kirby v. Illinois, supra). In all of the Supreme Court's decisions on this point, the need for an adversarial setting for the right to accrue stands out, as well it should when dealing with the right to counsel.

In the case before us, judicial proceedings began with the issuance of an arrest warrant but adversary judicial proceedings did not begin until after appellant was arrested and made a party to the proceedings. Prior to his arrest appellant was protected by, at the very least, the Fourth and Fifth Amendments but not the Sixth Amendment right to counsel, except, of course, in the custodial interrogation setting dealt with in Miranda. As noted earlier, there were no violations of appellant's Fourth and Fifth Amendment guarantees. To hold that the Sixth Amendment right to counsel as contemplated by appellant attached before he was made aware by arrest that the State intended to prosecute him would be to extend the Sixth Amendment right to counsel further than has any decision of the United States Supreme Court to date. The presence of such proceedings in the files of a court and the presence of a warrant in a law enforcement officer's desk or pocket is inert until triggered by placing the accused in custody. We refuse to adopt appellant's position and extend the Sixth Amendment application as he suggests.

Appellant complains that since an arrest warrant had issued, the police could do nothing further but arrest him. Delay in the use or execution of an arrest warrant does not make it invalid. 1 Wright, Federal Practice and Procedure: Criminal 2d § 55 (1982). There are no constitutional requirements dictating that an arrest warrant be executed at the earliest opportunity. People v. Nisser, 189 Colo. 471, 542 P.2d 84 (1975). Rule 4, W.R.Cr.P., dictates no time limit on the execution of an arrest warrant. We note that in Hoffa v. United States, supra, a Sixth Amendment argument similar to appellant's was raised. There it was argued that appellant Hoffa could have been arrested before a damaging, incriminating conversation was held with a government agent. Therefore, the incriminating evidence was acquired only by flouting Hoffa's Sixth Amendment right to counsel. The Supreme Court rejected the argument when it said:

> "Nothing in Massiah, in Escobedo [v. Illinois, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964)], or in any other case that has come to our attention, even remotely suggests this novel and paradoxical constitutional doctrine, and we decline to adopt it now. There is no constitutional right to be arrested. The police are not required to guess at their peril the precise moment at which they have probable cause to arrest a suspect, risking a violation of the Fourth Amendment if they act too soon, and a violation of the Sixth Amendment if they wait too long. Law enforcement officers are under no constitutional duty to call a halt to a criminal investigation the moment they have the minimum evidence to establish probable cause, a quantum of evidence which may fall far short of the amount necessary to support a criminal conviction." (Footnote omitted.) 385 U.S. at 310, 87 S.Ct. 417.

In view of the seriousness of the allegation of incest, we cannot condemn the police for waiting until a physician's exam of appellant's daughter was completed or that their evidence was otherwise firmed up before proceeding on the warrant. Appellant's Sixth Amendment right to counsel was unaffected.

Appellant calls our attention to several state court decisions 8/ in which he argues the Sixth Amendment right to counsel

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8/ Arnold v. State, Mo., 484 S.W.2d 248 (1972); People v. McGowan, 105 Cal. App.3d 997, 166 Cal.Rptr. 725 (1980); People v. Faulkner, 86 Ill.App.3d 136, 407 N.E.2d 126 (1980); State v. Mitchell, Tenn., 593 S.W.2d 280, cert. denied

has been extended to the point he requests us to extend it now. Reviewing those cases we note that in all but the New York case, the courts were faced with and addressed post-arrest and, in most cases, post-arraignment events. The criminal defendants were in those cases in custody, under arrest and well aware that the State was proceeding against them; therefore, they had the right to counsel at the critical stages set out in the various decisions. Of course the situation we are faced with is distinguishable in that here appellant had not yet been arrested when the alleged Sixth Amendment violations occurred.

As noted above, appellant also cited New York authority in support of his position. In People v. Samuels, fn.8 supra, the court makes it clear that the right to counsel attaches at the time a warrant issues because, in its view, a recent addition to their rules of criminal procedure requires as much. Prior to the adoption of that rule of procedure, New York followed the traditional view that held the right to counsel attached at arraignment on a warrant. People v. Samuels, supra fn.8. Because particular procedural rules in New York differ from ours, we find the line of cases following their rule changes to be less than persuasive here.

Our research of decisions from other jurisdictions leads us to the conclusion that adversary judicial proceedings at which the right to counsel attaches can only occur at some point after an individual has been arrested.9/ A criminal defendant's Sixth Amendment right to counsel attaches only when confronted by the prosecutorial forces of the State, when faced with the intricacies of substantive and procedural criminal law. We hold that the admission and use of the transcript of the telephone conversation was not a violation of appellant's Sixth Amendment right to counsel; therefore no plain error was committed.

Affirmed.

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449 U.S. 845, 101 S.Ct. 128, 66 L.Ed.2d 53 (1980); People v. Samuels, 49 N.Y.2d 218, 424 N.Y.S.2d 892, 400 N.E.2d 1344 (1980).

9/ State v. Irving, 231 Kan. 258, 644 P.2d 389 (1982) (taped conversation prior to adversary judicial proceedings not a Sixth Amendment violation); State v. Ruth, 102 Idaho 638, 637 P.2d 415 (1981) (accused entitled to counsel from initial appearance on); State v. Masaniai, 63 Hawaii 354, 628 P.2d 1018 (1981) (issuance and execution of an arrest warrant does not constitute the initiation of adversary judicial proceedings); State v. Fitzsimmons, 93 Wash.2d 436, 610 P.2d 893 (1980), on remand from United States Supreme Court, 94 Wash.2d 858, 620 P.2d 999 (1980) (a criminal defendant's Sixth Amendment right to counsel attaches when a critical stage in a criminal prosecution resulting in a loss of liberty is reached).

THOMAS, Justice, specially concurring.

I agree with the result in this case, and I do not necessarily disagree with any of the substantive law encompassed in the majority opinion. In my special concurring opinion in Barnes v. State, Wyo., 642 P.2d 1263 (1982), I did articulate my position with respect to disposition when a claim of error is urged upon this court under the guise of plain error.

I still am satisfied that as a matter of judicial restraint we should examine the substantive law only to the point of reaching a conclusion that plain error is not present. When, as in this instance, the absence of plain error hinges upon a conclusion that there exists no clear and unequivocal rule of law which was violated, we should not make any holding with respect to the merits of the appellant's claim of error. As I view the majority opinion, it does resolve a claim of error which is asserted to be reviewable under the plain-error doctrine even though review of the error claimed is foreclosed by the plain-error doctrine. For that reason I cannot join in the ground for disposition set forth in the majority opinion.

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IN THE SUPREME COURT
OF THE UNITED STATES

PAUL AUCLAIR,
Appellant,

vs

THE STATE OF WYOMING,
Appellee.

No. _____

82 6798

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS.

Persuant to rule 46.1 of the Rules of this Court motion is hereby made that Petitioner be allowed to proceed in Forma Pauperis . Petitioner's Affidavit is attached to this Motion. Leave to proceed in Forma Pauperis was sought and obtained for appeal to the Supreme Court fo the State of Wyoming.

Paul A. Auclair

Paul A. Auclair Pro Se
P.O.Box 400
Rawlins, Wyoming 82301.

IN THE SUPREME COURT
OF THE UNITED STATES

82 6798

PAUL AUCLIAR
Appellant.
VS
THE STATE OF WYOMING,
Appellee.

No. _____

RECEIVED
MAY 24 1983
Office of the CLERK
SUPREME COURT U.S.

AFFIDAVIT IN SUPPORT OF MOTION TO
PROCEED IN FORMA PAUPERIS

I, Paul A. Auclair, being first duly sworn according to law, depose and say that I am the Petitioner in the above- entitled case; that in support of my motion to proceed without being required to prepay fees, costs of give security therefor,: That because of my poverty I am unable to the costs of said case or to give security therefore, and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the costof proceeding in this court are true.

1. Are you presently employed ? NO.
My last employment ended May 1st. 1982. Salary was approximately $2,000.00 per month.

2. Have you received within the past twelve months any income from a business profession or other form of self employment, or in the form of rent payments, interest, dividends or other source? YES.
Ihave been incercarated in the Wyoming State Penitentiary since August 4th 1982, my income since then to the present has averaged $50.00. per month from State pay.

3. Do you own a cash or checking or savings account? NO.

4. Do you own any Real Estate, stocks, bonds, notes, automobiles or other valuable property? NO.

5. List the persons who are dependent upon you for support and state your relationship to these persons? NONE.

I understand that a false statement or answer to any question in this Affidavit will subject me to penalties for perjury.

MAY 17, 1983

Paul A. Auclair

Paul A. Auclair Pro Se
P.O.Box 400
Rawlins, Wyoming 82301

Witnessed by _____.

_____.

John K. Bunch

John K. Bunch Notary Public
County Of Carbon State Of Wyoming
My Commission Expires May 30, 1983

May 17, 1983